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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN GREGORY MAXWELL,

Defendant and Appellant.

C061622

(Super. Ct. No.  
F08355)

Defendant Justin Gregory Maxwell entered a negotiated plea of guilty to lewd and lascivious conduct with a child under the age of 14 years (Pen. Code, § 288, subd. (a); all further statutory references are to the Penal Code) in exchange for dismissal of the remaining counts (three counts of § 288, subd. (a); one count of § 647.6, a misdemeanor), no state prison at the outset, and the trial court's determination of whether

lifetime sex offender registration applied under *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*).

The court suspended imposition of sentence and granted probation subject to certain terms and conditions, including mandatory registration pursuant to section 290.

Defendant appeals. He obtained a certificate of probable cause. (§ 1237.5.) He contends (1) the trial court "erred and abused its discretion and violated [defendant's] right to equal protection" in imposing mandatory lifetime sex offender registration, and (2) the plea agreement with respect to registration was "illusory and not a proper and complete advisement," requiring remand to allow defendant an opportunity to withdraw his plea. We will affirm the judgment.

#### **FACTS AND PROCEDURAL HISTORY**

During one evening in August 2008, the 31-year-old defendant hugged and kissed a 13-year-old girl, a runaway, who was spending the night at his apartment. He also fondled her breasts. Defendant had met the victim two years earlier when he worked as a teacher and counselor.

Defendant was charged with four counts of violating section 288, subdivision (a) and one count of violating section 647.6. The complaint included the advisement that conviction of any of the offenses would require registration pursuant to section 290.

The plea form reflects that defendant entered a plea to one count of section 288, subdivision (a) under the following conditions: the remaining counts would be dismissed, no state

prison at the outset, and registration would be determined by the court at the time of sentencing pursuant to *Hofsheier*. With respect to registration, defendant initialed the statement, "I understand I may be required to register as a sex offender." The word "will" was crossed out and "may" handwritten in. The plea form also reflects that defendant initialed the following advisement: "At the time of sentencing, the sentencing judge may withdraw approval of this plea. If the judge does so, I will be permitted to withdraw my plea."

At the entry of plea hearing, the trial court recounted the conditions of the plea, including that "registration at the time of sentencing to be determined by the Court pursuant to recent Supreme Court -- well, *People versus Hofsheier*." The trial court also advised, "[T]here is the possibility that you would be required to register pursuant to [section] 290 of the Penal Code as a sex offender."

The probation report dated March 11, 2009, reflected that registration was mandatory. On March 17, 2009, the trial court advised defendant that his conviction appeared to require mandatory registration. Defendant obtained a two-week continuance to research the issue of mandatory registration.

Citing *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*), the People argued that defendant was subject to mandatory registration.

Defense counsel filed a statement in mitigation, requesting that the court "apply its discretionary authority not to order registration."

On April 1, 2009, the trial court determined that registration was mandatory. The court then inquired whether there was any legal cause not to proceed with sentencing. Defense counsel stated that there was none. The court then granted probation subject to mandatory registration.

## **DISCUSSION**

### **I**

Defendant first contends that the trial court “erred and abused its discretion” in determining that he was subject to mandatory registration, thus violating his right to equal protection. Defendant claims the facts here are similar to those in *People v. Ranscht* (2009) 173 Cal.App.4th 1369 (*Ranscht*) in which the defendant, convicted of sexual penetration of a 13-year-old girl (§ 289, subd. (h)), was subject to discretionary registration consistent with *Hofsheier* (*Ranscht*, at pp. 1372, 1375).

Section 290 requires registration for anyone convicted “of a violation of . . . Section . . . 288 . . . .” (§ 290, subd. (c).) Defendant was convicted of violating section 288, subdivision (a); thus, registration was mandatory. (*Hofsheier*, *supra*, 37 Cal.4th at p. 1198; *Manchel*, *supra*, 163 Cal.App.4th at p. 1114; *People v. Cavallaro* (2009) 178 Cal.App.4th 103, 109 (*Cavallaro*); *People v. Anderson* (2008) 168 Cal.App.4th 135, 141-144 (*Anderson*).)

*Hofsheier* involved a 22-year-old defendant convicted of violating section 288a, subdivision (b)(1) for engaging in oral copulation with a 16-year-old girl. (*Hofsheier*, *supra*,

37 Cal.4th at pp. 1192-1193.) Because a defendant convicted of violating section 261.5 for unlawful sexual intercourse with a 16-year-old girl was not subject to mandatory registration, a defendant convicted of violating section 288a, subdivision (b)(1) was not subject to mandatory registration based on equal protection principles; however, the defendant was subject to discretionary registration. (*Hofsheier, supra*, 37 Cal.4th at pp. 1195, 1207-1209.) The court in *Hofsheier* noted that anyone convicted of violating section 288 is subject to mandatory registration irrespective of whether oral copulation or intercourse was involved. (*Hofsheier, supra*, 37 Cal.4th at p. 1198.)

*Ranscht* involved a defendant convicted of violating section 289, subdivision (h) for sexually penetrating a 13-year-old girl. (*Ranscht, supra*, 173 Cal.App.4th at pp. 1372, 1375.) *Ranscht* concluded that principles of equal protection precluded mandatory registration; however, the defendant was subject to discretionary registration. (*Id.* at p. 1375.)

*Ranscht* is inapplicable. Here, defendant was convicted of violating section 288, subdivision (a), not section 289, subdivision (h). Section 288, subdivision (a) is a specific intent offense while section 289, subdivision (h) is a general intent offense. (See *Anderson, supra*, 168 Cal.App.4th at p. 142; *Cavallaro, supra*, 178 Cal.App.4th at p. 114.)

*Ranscht* stated, "Consistent with *Hofsheier*, we think the more appropriate course is to focus on the offense of which the defendant was *convicted*, as opposed to a hypothetical offense of

which the defendant *could have been* convicted based on the conduct underlying the charge.” (*Ranscht, supra*, 173 Cal.App.4th at p. 1375; see also *People v. Kennedy* (2009) 180 Cal.App.4th 403, 410-411.)

We conclude the trial court properly determined mandatory registration applied to defendant, who was convicted of violating section 288, subdivision (a). There was no denial of equal protection since anyone convicted of that offense would be subject to mandatory registration.

## II

Defendant seeks remand in order to be allowed to withdraw his plea, arguing that the registration condition of his plea (registration would be discretionary with the trial court pursuant to *Hofsheier*) was illusory. As the People assert, defendant has forfeited this claim.

When a plea is entered in exchange for specified benefits, the prosecutor and the defendant “must abide by the terms of the agreement.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) The plea agreement controls the punishment a trial court may impose but an insignificant deviation does not violate a defendant’s rights. (*Ibid.*) If the court significantly varies the punishment from the agreement, and the defendant fails to object although previously advised he might withdraw his plea if approval of the plea agreement is withdrawn, the defendant is deemed to have forfeited any objection. (*People v. McClellan* (1993) 6 Cal.4th 367, 377-378 (*McClellan*); *Walker, supra*, 54 Cal.3d at p. 1024.)

Here, defendant failed to move to withdraw his plea although he had previously been advised that he might do so if the sentencing court withdrew approval of the plea. The plea agreement was conditioned on trial court discretion in determining whether registration was required. When it became apparent that registration was mandatory, as noted by the probation officer, the court, and the prosecutor, defense counsel sought and obtained a continuance to research the issue. Thereafter at sentencing, defendant did not move to withdraw his plea when he had an opportunity to do so and thus forfeited his right to withdraw his plea.

Sex offender registration is a mandatory element of the punishment for defendant's offense. (§ 290.) In advising defendant at the entry of plea hearing, the court informed him that registration might be required. Defendant did not object when granted probation subject to mandatory registration. There is nothing in the record to indicate that defendant would not have entered his plea if he had been properly advised of mandatory registration at the entry of plea hearing.

(*McClellan, supra*, 6 Cal.4th at pp. 380-381.)<sup>1</sup>

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<sup>1</sup> Defendant was not confined after the court suspended imposition of sentence and granted probation, having been awarded credit for time served. (§ 4019, subd. (a)(2).) In any event, the recent amendments to section 4019 would not operate to modify defendant's entitlement to credit, as he was required to register as a sex offender. (§ 4019, subds. (b), (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

**DISPOSITION**

The judgment is affirmed.

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RAYE, J.

We concur:

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SIMS, Acting P. J.

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CANTIL-SAKAUYE, J.